

## Third Party Funding in Arbitration: An Indian Perspective

### Introduction

In recent years, Arbitration has become one of the most preferred mode of dispute resolution because of it's certain characteristics such as flexibility, confidentiality, finality and most important of all, party autonomy. However, in spite of there being so many benefits available to the parties involved in arbitration proceedings, it also involves heavy financial commitments, which may act as a barrier for parties choosing arbitration as their **dispute resolution** mechanism. Does this indicate that arbitration is preferable only for entities which are financially strong and independent? To address this question, the concept of Third-Party Funding (TPF) has emerged as an answer, “*a financing method in which an external entity, not directly involved in a particular dispute, provides financial support by covering legal fees or paying an order, award, or judgment issued against one or both parties involved in exchange for a portion of the awarded damages.*”<sup>1</sup>

It is a process in which an external third party agrees to fund one of the parties involved in arbitration in exchange of some part or share in the compensation awarded, if the funded party wins. When it comes to regulatory frameworks for TPF, it has gained proper legal recognition in various jurisdictions, such as Singapore under the **Singapore International Arbitration Centre (SIAC) Rules**, 2016,<sup>2</sup> however, India still remains in a state of legal uncertainty. Although some Indian courts, in cases such as *Tomorrow Sales Agency v. SBS Holdings*,<sup>3</sup> and *Bar Council of India v. A.K. Balaji & Ors.*,<sup>4</sup> have made some advancements in TPF, but the lack of explicit regulation causes ambiguity.

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<sup>1</sup>Kritika Krishnamurthy and Naveena Pradeep, ‘*Third-Party Funding of Domestic Arbitration in India — Key Technical Barriers, Plausible Solutions and the Way Forward*’ (SCC Online, 18 November 2023) <https://www.scconline.com/blog/post/2023/11/18/third-party-funding-of-domestic-arbitration-in-india-key-technical-barriers-plausible-solutions-and-the-way-forward/> accessed 22 March 2025

<sup>2</sup>Singapore International Arbitration Centre, SIAC Rules (7th edn, 1 August 2016) <https://jsumundi.com/en/document/rule/en-siac-arbitration-rules-2016-siac-arbitration-rules-2016> accessed 22 March 2025

<sup>3</sup>(2023) SCC OnLine Del 3191.

<sup>4</sup>2018 AIR 1382 (SC).

All that exists, is reliance on judicial precedents and contractual rights available to the parties.

## **Current Stance of Indian Judiciary: Tomorrow Sales Case**

The *Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings Inc.*<sup>5</sup> case has been an important ruling by the Indian courts when it comes to TPF. The matter arose from an SIAC arbitration which began in 2019 by Transpole Logistics and its promoters against SBS Holdings, a Japanese logistics company. The claimants were financed by Tomorrow Sales Agency (TSA), a non-banking financial company, under a Bespoke Funding Agreement (BFA). However, when the tribunal rejected their claim of USD 48 million and instead awarded SBS over USD 1 million in costs, SBS tried to enforce this amount against TSA, arguing that the funder played an important role in the arbitration .

A single judge bench of the Delhi High Court at first ruled in favor of SBS, ordering TSA to disclose where its assets are coming from and freezing them up to the award amount. However, on appeal, a two-judge bench of the Delhi High Court overturned this ruling, holding that a “*third-party funder cannot be bound by an arbitral award unless it has explicitly assumed liability for costs. The third-party funding is essential to ensure access to justice and funders cannot be subject to liability which they have neither undertaken nor are aware of.*”<sup>6</sup>

The judgment reaffirmed that non-signatories to an **arbitration agreement** cannot be made liable for an arbitral award unless specific conditions are met. It referenced previous Supreme Court rulings such as *Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd.*<sup>7</sup> and *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.*,<sup>8</sup> distinguishing them from the present case by emphasising that TSA had neither participated in the arbitration nor contractually agreed to cover any adverse costs. The court also noted that TSA’s funding arrangement was duly disclosed to the SIAC tribunal, as required under SIAC Rules.

The case also highlighted a regulatory gap in India regarding disclosure obligations for third-party funding agreements. Unlike jurisdictions such as Singapore, where funders’ involvement

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<sup>5</sup> Tomorrow Sales (n3).

<sup>6</sup> Krishnamurthy and Pradeep (n1).

<sup>7</sup> (2021) 7 SCC 248.

<sup>8</sup> (2013) 1 SCC 641.

must be disclosed, Indian law does not currently mandate such disclosures, potentially creating conflicts of interest between funders, arbitrators, and parties.<sup>9</sup>

This ruling has significant implications for the development of third-party funding in **Indian arbitration**. It reassures funders that they cannot be arbitrarily held liable for costs unless explicitly stated in their agreements, making India a more attractive jurisdiction for arbitration financing.<sup>10</sup> However, the absence of statutory clarity on security for costs remains a concern. The ruling did not address whether tribunals should have the power to order security for costs in cases where claimants rely on TPF, an issue that remains contentious in **international arbitration**.

## **Need for Regulating Third-Party Funding in India**

TPF has become an important aspect in arbitration, as it offers financial assistance to parties who might otherwise be unable to pursue their claims. Given the high costs associated with arbitration, including legal fees, expert charges, and tribunal expenses, TPF enables claimants to seek justice without bearing an excessive financial burden.<sup>11</sup> It also helps businesses in managing financial risks, allowing them to allocate resources efficiently while ensuring that disputes are resolved effectively. As per this author, TPF is crucial for India, enabling financially unstable businesses to pursue arbitration without depleting resources. It enhances access to justice, filters out frivolous claims, and aids in award enforcement as well. As India seeks to become a global arbitration hub, a structured regulatory framework is essential.

## **Conclusion**

Third-party funding (TPF) in arbitration has become an essential tool in ensuring access to justice, particularly for parties with limited financial resources. While Indian courts have begun

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<sup>9</sup> Andrew Roberts, 'Practical Insights on Third-Party Funding in Arbitration' in *Practical Insights on Arbitral Procedure* (Kluwer Law International, 2025).

<sup>10</sup> Shaneen Parikh and Amoga Krishnan, 'Delhi High Court Rules Third Party Funders Vital to Justice but Not Liable for an Adverse Costs Award' (Kluwer Arbitration Blog, 6 June 2023) <https://arbitrationblog.kluwerarbitration.com/2023/06/06/delhi-high-court-rules-third-party-funders-vital-to-justice-but-not-liable-for-an-adverse-costs-award/> accessed 24 March 2025.

<sup>11</sup> Kaira Pinheiro and Dishay Chitalia, 'Third-Party Funding in International Arbitration: Devising a Legal Framework for India' (2021) 14(2) NUJS L Rev 255.

recognizing TPF, the absence of a structured regulatory framework continues to create legal uncertainty. *The Tomorrow Sales Agency v. SBS Holdings* case reaffirmed that funders cannot be arbitrarily held liable for costs, which has reassured investors. However, it also exposed critical gaps in disclosure requirements, cost security, and ethical oversight.

India cannot afford to rely solely on judicial precedents to regulate such a crucial aspect of arbitration. Without a structured framework, arbitration risks being influenced by funders in ways that could compromise party autonomy and ethical standards.